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IN THE

Supreme Court of the United States

October Term, 1962

NO. ~~1001~~ 149

JAMES W. HARLOW and CHARLES E. WILSON,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

JOEL W. WESTBROOK, Esq.
306 Amicable Building
Waco, Texas

Attorney for Petitioner,
JAMES W. HARLOW

CHARLES E. WILSON, pro se
(Pending Admission to the Bar
of the Supreme Court of
James Gillespie, Esquire)

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TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioners, James W. Harlow and Charles E. Wilson, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case.

OPINIONS BELOW

There was no opinion in the District Court. The opinion of the Court of Appeals (Tuttle, Chief Judge, Rives [Specially Concurring] and Wisdom, Circuit Judges) has not yet been reported (printed, infra, Appendix I).

JURISDICTION

The judgment of the Court of Appeals was entered April 4, 1962.

The order denying Petitioners' Motion for Rehearing was entered by the Court of Appeals on April 30, 1962.

Jurisdiction to issue the writ rests on Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

A. Did the Court of Appeals err in its holding that the Petitioners were "persons acting for or on behalf of the United States" (App. I, 14-15)*? The substantive counts of the indictment (under Section 202, Title 18, United States Code), as well as the first count (the conspiracy count, under Section 371 of Title 18, United States Code), depended upon the government's contention that Petitioners, as employees of the European Exchange Service during the approximate periods of January 1, 1950, to September of 1953, in occupied Germany, were either officers and employees of the United States, or were "persons acting for or on behalf of the United States." (R. 2-20) The Court of Appeals acknowledged that there was doubt that Petitioners could be considered as federal employees within the meaning of Section 202, Title 18, United States Code, but held that they were "persons acting for or on behalf of the United States." (App. I, 14-15) Both the Trial Court and the Court of Appeals held adversely as a matter of law to Petitioners' contentions that they were not either federal employees or "persons acting for or on behalf of the United States" in their capacity as European Exchange

*Appendix I, appended hereto, is the opinion below of the Court of Appeals.

Service employees, and furthermore, the Trial Court refused to admit into evidence the contracts of employment Petitioners had with the European Exchange Service, which contracts explicitly stated that Petitioners were "not considered to be . . . federal employee[s]. (R. 1195, 1198, 1203-1204)

B. Did the Court of Appeals err in holding admissible into evidence letters from the Petitioner Harlow to the Petitioner Wilson which, taken together with other evidence, were decidedly incriminating with respect to the conspiracy count and the substantive counts, when

(1) The search warrant issued by the United States District Judge for the High Commission of Germany failed to name the affiants, failed to describe the letters with any particularity at all, and failed to describe the letters as being stolen or embezzled, or as instruments of the crime, or as within the purview of Section 957, Title 18, United States Code, as required by Rule 41(b), F. R. Crim. Pro.

(2) No affidavit was produced at the trial below in support of probable cause.

(3) The secondary evidence of probable cause was admitted without an adequate predicate.

(4) The secondary evidence admitted did not establish probable cause, and consisted of hearsay and conclusions, and did not purport to describe the letters which were seized.

(5) The government originally acquired its knowledge of these letters through illegal interception of the mail.

C. Did the Court of Appeals err in holding that Petitioners were sufficiently apprised of the conspiracy charge against them through the allegations of Count One of the indictment and the government's Bill of Particulars, and in spite of the

Trial Court's failure to enforce his orders to the government to produce certain documents before trial for Petitioners' inspection and copying, and in spite of the Trial Court's denial of Petitioners' motion to inspect the Grand Jury minutes? The conspiracy count alleged in very general terms that the Petitioners and others conspired to cause certain persons and firms and corporations and vendors and agents of vendors to enter into agreements to give the Petitioners a part of their sales commissions and to pay money into numbered bank accounts in Switzerland, and that the Petitioners caused certain persons and firms, and corporations, and agents to believe there was a corrupt group of employees kown as "the organization" that had it in their power to award contracts, and so on, these persons, firms, and so forth, not being specified, with the exception of two persons named McLane and Emborg, the conspiracy count indicating that there were other, unspecified, persons, firms, etc., involved besides these two. (R. 2-9) In its Bill of Particulars the government did not name any other persons besides these two (R. 39-42), but in the evidence presented by the government a number of other persons were named, over Petitioners' objections. (R. 320-340)

D. Did the Court of Appeals err in holding that there was not a fatal variance in the evidence relating to the conspiracy count from the allegations thereof, as against our contention that, while the conspiracy count, as construed by the Trial Court, purportedly alleged only one conspiracy, the evidence admitted over our objections in the Trial Court tended to show at least one other conspiracy, and quite possibly several other conspiracies? Specifically, the conspiracy count charged conspiracy between the Petitioners and a man named Port (deceased at the time of trial) and a defendant named Addy, whose conviction on the conspiracy count (the only

one with which he was charged) was reversed by the Court of Appeals on the grounds of insufficient evidence. The Court of Appeals held that the evidence was insufficient to show that Addy was a participant in the conspiracy charged in the indictment, although the Court of Appeals recognized that there was evidence introduced tending to show that Addy was a member of at least one conspiracy other than that charged. (App. I, 9-11) In connection with this question, Petitioners urged on the Court of Appeals that the Trial Court had committed prejudicial error in not granting our Motion for Mistrial when the government counsel exhibited to the jury a picture of the defendant Addy, in connection with testimony which indicated that it was found in the quarters of the Petitioner Wilson during the search thereof by investigators, although this picture was patently inadmissible and never even offered in evidence. (R. 697-719)

E. Did the Court of Appeals err in holding that the substantive counts correctly laid venue in the San Antonio Division of the Western District of Texas under Section 3238, Title 18, United States Code, by alleging the commission of the offenses "on the high seas or elsewhere out of the jurisdiction of any particular State or district?" In Petitioners' motion to dismiss the substantive counts, it was contended that these offenses, if any, were committed within the jurisdiction of the United States Court for the High Commission of Germany, and it was further contended that in substantive counts five through nine, there was no allegation as to where the offense did occur. (R. 1312)

F. Did the Court of Appeals err in holding as not prejudicial, on the basis that other evidence overwhelmingly established the guilt of the Petitioners, the erroneous admission of hearsay evidence (App. I, 25), the same including:

(1) Testimony by the prosecuting witness McLane, agent of a vendor dealing with the European Exchange Service, as to the contents of memoranda prepared by European financial institutions and purportedly reflecting transfers of money in favor of an account number purportedly designated by the Petitioner Harlow. (R. 153-154, 231-239)

(2) A letter purportedly written by the prosecution witness McLane in London to the Petitioner Harlow in San Antonio, Texas. (R. 174-175, 179-182)

(3) A letter purportedly sent by the prosecuting witness Emborg, agent of a vendor to the European Exchange Service, to the American Express Company, requesting transfer of funds to a Swiss bank for two numbered accounts. (R. 1046-1048)

(4) A letter from the prosecuting witness Emborg to the Petitioner Harlow respecting a purchase order and the expected transfer of a large sum of money "in the usual way." (R. 1048-1056)

(5) "Confirmations" from financial institutions purportedly received by the prosecuting witness Emborg through the mail reflecting transfers to Swiss banks in favor of numbered accounts. (R. 1027-1045)

(6) A ledger sheet purportedly prepared by the secretary of the prosecuting witness Emborg and purportedly itemizing bribes paid to accounts designated by the Petitioner Harlow. (R. 1065-1078)

G. Did the Court of Appeals err in holding that the government had not prejudiced the Petitioners' ability to prepare for trial by deliberate and unwarranted delay in bringing the case to trial? The indictment alleged criminal conduct on the part of Petitioners and others generally over the period Jan-

uary 1, 1950 to about January 1, 1954, with actually there being no evidence introduced of any criminal conduct later than September, 1953. The indictment was not returned until April 19, 1957, and the case was not called for trial until June 6, 1960. There was no delay interposed by Petitioners, nor did the government claim such. Petitioners did not file any motion, it is true, seeking an earlier trial. There was no contest of Petitioners' contention that many of those connected with the European Exchange System, having valuable and relevant information, had moved to other parts of the world, or that the alleged co-conspirator Port, who supervised the drawing of all the food contracts between the Exchange System and vendors, and who had full knowledge of the purchasing procedures of the European Exchange Service, died on May 15, 1959, more than a year prior to the date of trial. There was testimony offered by the government respecting the deceased co-conspirator Port's participation in the criminal conduct, and there were admissions by the prosecuting witness McLane on cross-examination that he had signed certain documents reflecting that he (McLane) was the true owner of a numbered Swiss bank account carried in the co-conspirator Port's name, that he had received from that account all the funds deposited therein, and there was no explanation made by the prosecuting witness McLane on cross-examination or on re-direct of this rather unusual circumstance. (R. 283-287) Furthermore, the prosecuting witness McLane admitted that he had a contract with a man named Lamb to share all the commissions received in European Exchange Service transactions, and that he had not shared these commissions with Lamb. (R. 277-279)

CONSTITUTIONAL PROVISIONS, STATUTES, AND FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED

A. There is involved the **Fourth Amendment to the Constitution of the United States**, the same reading as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

B. There is also involved the **Sixth Amendment to the Constitution of the United States**, which reads as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

C. The principal criminal statute involved is **§202 of Title 18, U. S. Code**, reading as follows:

> **"Acceptance or solicitation by officer or other person.** Whoever, being an officer or employee of, or person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or agency thereof, or an officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or of both Houses thereof, asks, accepts, or receives any

money, or any check, order, contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity or in his place of trust or profit, influenced thereby, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both; and shall forfeit his office or place and be disqualified from holding any office of honor, trust, or profit under the United States."

D. Also involved is §371 of Title 18, U. S. Code, reading as follows:

"Conspiracy to commit offense or to defraud United States. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

E. Also involved is §3238 of Title 18, U. S. Code, reading as follows:

"Offenses not committed in any district. The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought."

F. Also involved is §1732 of Title 28, U. S. Code, reading as follows:

> "**Record made in regular course of business.** In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> "All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.
>
> "The term 'business,' as used in this section, includes business, profession, occupation, and calling of every kind. June 25, 1948, c. 646, 62 Stat. 945."

G. Also involved is §150k of Title 5, U. S. Code, reading as follows:

> "**Civilian employees not subject to laws administered by Civil Service Commission.** Civilian employees, compensated from nonappropriated funds, of the Army, and Air Force Exchange Service, Army and Air Force Motion Picture Service, Navy Ship's Stores Ashore, Navy exchanges, Marine Corps exchanges, Coast Guard exchanges, and other instrumentalities of the United States under the jurisdiction of the Armed Forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the Armed Forces, shall not be held and considered as employees of the United States for

the purpose of any laws administered by the Civil Service Commission or the provisions of the Federal Employees' Compensation Act, as amended: Provided, That the status of these nonappropriated fund activities as Federal instrumentalities shall not be affected. June 19, 1952, c. 444, §1, 66 Stat. 138."

H. Also involved are the following **Federal Rules of Criminal Procedure:**

17 (c) **Subpoena. For Production of Documentary Evidence and of Objects.** A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

41 (b) **Search and Seizure. Grounds for Issuance.** A warrant may be issued under this rule to search for and seize any property

(1) Stolen or embezzled in violation of the laws of the United States; or

(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or

(3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U. S. C., § 957.

41 (c) **Search and Seizure. Issuance and Contents.** A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the

grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

48(b) **Dismissal By Court.** If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

STATEMENT OF THE CASE

Petitioners, together with Thomas Addy, were convicted on June 16, 1960 (Honorable W. R. Wallace, United States Judge for the Western District of Oklahoma, Assigned, deceased between conviction and sentence) and sentenced on February 14, 1961 (Honorable Ben H. Rice, Jr., Judge) in the United States District Court for the Western District of Texas, San Antonio Division, under an indictment charging

the first count a conspiracy between the Petitioners, Thomas Addy (whose conviction was reversed by the Court of Appeals), and one Paul Port (deceased at the time of trial), as well as others unnamed, as European Exchange Service employees and in such capacities purportedly as United States government employees, or as persons acting for or on behalf of the United States, to defraud the United States with respect to the honest administration of the affairs of the European Exchange System, averring that this conspiracy was substantially accomplished by the solicitation of bribes from vendors and agents of vendors to the European Exchange System. The indictment also alleged in counts two and three the solicitation of bribes on the part of Petitioner Wilson of the prosecuting witness McLane, and in counts four through nine the receipt by Petitioner Harlow of bribes from the prosecuting witness McLane and the prosecuting witness Emborg.

The period of time allegedly covered by the conspiracy charged in the First Count of the indictment was from about January 1, 1950 to about January 1, 1954, and the places where this conspiracy occurred were alleged to be Nurnberg, Germany; Zurich, Switzerland; Amsterdam, Holland; London, England, Paris, France; San Antonio, Texas; and "other places more particularly to the Grand Jury unknown." (R. 3)

Substantive counts two and three (Wilson) alleged that the offenses were committed at points "out of the jurisdiction of any State or district in the United States," and all substantive counts alleged that, subsequent to the commission of these acts, Petitioners Wilson and Harlow each returned to the United States and resided in San Antonio, Texas, and were each found in the Western District of Texas on the date of the return of the indictment.

Petitioners filed motions to suppress evidence, the same

being documents taken from the living quarters of the Petitioner Wilson in Nurnberg, Germany, in 1953. (R. 98, 1321)

Before the introduction of evidence began in the trial, the Court granted the motion (R. 126). Then the Court reconsidered this action and heard extensive testimony and argument in chambers.

To meet Petitioners' objection that there was no affidavit in support of the search warrant, the Government then undertook to produce testimony of the former United States Judge for the Court of the Allied High Commission of Germany, Judge Turmo, who issued the warrant. The Government sought to establish by him the contents of the affidavit, to which we objected on the grounds that there was insufficient predicate for this secondary evidence, there not being a satisfactory accounting for the absence of the affidavit, and we also objected to much of the testimony on the grounds that it constituted conclusions of the witness.

Similarly we objected to the testimony of the District Attorney and of the investigators with respect to the contents of the affidavit. The Court then permitted the introduction into evidence of the documents seized during this search of the Petitioner Wilson's quarters. (R. 536-570, 594-612, 652-653, 690-699, Ex. 22-28)

Then it developed, during cross-examination of the key government witness McLane, that McLane, in May of 1953, **prior** to the search of Wilson's quarters in September of 1953, had been shown by the government investigators a copy of government Exhibit 22, one of the letters seized in the Wilson quarters search. He testified he was told by the government investigators of the contents of other such letters that the government investigators had intercepted. He testi-

fied that he undertook to get Emborg also to cooperate with the government in this case. (R. 847-848, 854-857)

This development in McLane's cross-examination occurred on the afternoon of June 13, 1960, a week after the trial had begun.

Following the recess on that day, there occurred extensive testimony in chambers (R. 875-908), which continued the next day. (R. 909-1014)

The Court indicated he was satisfied that the letters had been illegally intercepted, and that these illegally intercepted letters were the basis for the investigators being able to break McLane down, that the record failed to show that an affidavit in support of the search warrant was ever filed, and that the Fourth Amendment had been violated. (R. 988-989, 994-995)

The Court indicated he would declare a mistrial because it was impossible to cure the prejudice resulting from the letters having been admitted into evidence. (R. 988, 1000-1002) The following morning, June 15, 1960, however, the trial court concluded that the evidence was admissible and did not declare the mistrial. (R. 1015-1016)

One of the exhibits seized in the search of Petitioner Wilson's quarters was a folder belonging to Thomas Addy, containing personal papers of Addy, none relating to the alleged conspiracy, and a large photograph of Addy. This exhibit was not made available to the Petitioners, although encompassed in the Court's order prior to trial and it was not introduced into evidence, but Petitioners moved for a mistrial on the grounds that government's counsel under very dramatic circumstances had exhibited the file folder with Addy's picture to the jury. The Trial Court overruled the motion on the

grounds that this did not constitute prejudice. (R. 699-719, Ex. 29).

During McLane's testimony, over our objections he was permitted to testify from documents he said had been prepared by the Credit Swiss Bank and Popularis Tours, giving dates and amounts of money he claimed were transferred from his Popularis Tours Account to account number 198427, a number he had testified Petitioner Harlow designated. The documents themselves (Ex. 7 and 7A) were never accepted in evidence. (R. 227-240)

A letter purportedly written by McLane in London to Petitioner Harlow in San Antonio was identified as such by McLane and introduced into evidence as against Petitioner Harlow over our objections that the same was hearsay, and that there had not been a proper predicate laid for its introduction. (R. 173-181)

Henrik Emborg testified that Petitioner Harlow had suggested to him that he make payments into a designated numbered bank account in Switzerland for the purpose of improving his business relations with the European Exchange Service. (R. 1021-1023)

During his testimony, the government had Emborg identify what purported to be a ledger sheet containing an itemization by date and amount of moneys deposited to the accounts allegedly designated by Harlow. This sheet was admitted into evidence over our objection that it was hearsay, and that a proper predicate had not been laid to establish a "Shop Book Rule" exception. (R. 1065-1078)

During Emborg's testimony the government had him identify some American Express Co. "confirmations" (Ex. 32-42), purportedly received by him through the mail, and reflecting

that American Express had transferred various sums of money to Credit Suisse and Union Bank (of Switzerland) in favor of three different numbered accounts therein on behalf of Filbert, Ltd., purportedly represented by Emborg. The Trial Court overruled (R. 1031, 1041) our objection on the grounds of hearsay (R. 1029), lack of predicate for The Shop Book Rule (R. 1028), and surprise because of non-compliance with the Court's order to produce documents before trial. (R. 1033-1040)

Then, over our objection that it was hearsay, and no Shop Book Rule exception predicate laid, the Court admitted into evidence a letter from Filbert, Ltd., purportedly mailed by Emborg, to American Express, requesting the transfer of some funds to the Union Bank for two numbered accounts. (Ex. 43, R. 1046-1048)

Then, the Court admitted into evidence Ex. 44, purportedly a copy of a letter from Emborg to Harlow, dated May 26, 1953 (several months after Harlow left EES—R. 1057) at the Southern Marketing Co., 4 Old Burlington St., London, England, correcting some figures on a purchase order, calculating therefrom the sum of $5686.41, which the letter states will be transferred "in the usual way," our objection being that the same was hearsay, and of surprise because of failure of the government to comply with the order to produce documents before trial. In addition, we moved for a mistrial. (R. 1048-1057)

The government introduced through former EES investigators Stewart and Bray evidence of what we called the "Black Forest" case. (R. 1153)

Substantially Stewart testified that he and Bray had a conversation in July, 1952 with their immediate superior, Addy, then Chief of Security for EES (R. 314). This conversation,

according to Stewart concerned principally 400 day clocks, which were a "hot item within the PXs." Stewart was of the opinion that in the Black Forest "we could find clock makers" to supply these clocks, and "the point came up, maybe we could make a little bit of money in it" and that "Mr. Addy agreed to this." (R. 320-321)

Stewart testified that attempted contacts with a man named Preetz (with reference to reinstating with EES a firm—Hertzog—selling barber shop units), and a man named Eiler producing nothing (R. 324-325), he had a further conversation with Addy, who said that, if Stewart could arrange to secure a certain amount of money from the Hertzog firm, he (Addy) would arrange with one Friedman, to have the firm taken from the blacklist and resume business with EES (R. 325).

Stewart testified that Addy, Bray and he received "kickbacks" from Eiler, not only from the Hertzog firm, but from other vendors, naming Rath-Geschwinn (R. 325-327, 329). The court overruled our objections that this testimony consisted of conclusions, was irrelevant, and involved persons and firms not named in the indictment or Bill of Particulars. (R. 325-327, 329-340)

Further, Stewart testified that in September of 1952 Addy gave Stewart and Bray blank forms from a Swiss bank, telling them to fill them out, and that he (Addy) would arrange for certain monthly sums to be deposited to the numbered bank accounts created thereby, thus enabling Bray and Stewart to stay away from the firms (R. 333), the bank purportedly being Bank Fur Anlagewerte (R. 339).

Stewart then testified about his participation in the investigation of McLane in July of 1953 (R. 343-348).

McLane testified that Wilson, in an Amsterdam, Holland,

Park Hotel conversation, told him Addy was "being taken care of by the organization." (R. 202)

Emborg testified that he met Addy "on a few occasions" (R. 1019), and recognized him in the courtroom. (R. 1065)

The Trial Court excluded our offer of evidence reflecting that the contracts of employment between Petitioners and European Exchange Service specified that Petitioners were not government employees. (Ex. W-z, R. 1195, 1198, 1203-1204, Addy Ex. E, C, D, B, R. 1209, 1211) The Trial Court also excluded our offer of the European Exchange Service purchase contracts let during the period for the purpose of establishing that Petitioners did not in fact award these contracts, and furthermore, that an analysis of them would negative the idea any favoritism was shown to Emborg and McLane. (R. 1199-1206)

The Court of Appeals affirmed the conviction of the Appellant Harlow on all counts (conspiracy Count One, and substantive Counts Four through Nine) and the conviction of Petitioner Wilson on substantive Counts Two and Three, and reversed the conviction of the Appellant Addy on Count One (App. I, 25). The Court reversed the conviction of Petitioner Wilson of the conspiracy charge on the grounds of double jeopardy, Petitioner Wilson having been convicted in March, 1954, before the United States Court of the Allied High Commission of Germany of the same offense (App. I, 21-25).

REASONS FOR GRANTING THE WRIT

A. With reference to the question as to whether or not the Fifth Circuit erred in its holding that Petitioners were "persons acting for or on behalf of the United States":

(1) This holding of the Fifth Circuit is in conflict, in our

opinion, with the holding of the United States Supreme Court in *U. S. v. Kirchman*, 256 U. S. 363, 41 S. Ct. 514, 65 L. Ed. 992, where the Supreme Court reversed the bribery conviction of a railway porter employed in wartime when the railroads were under the control of, and operated by, the federal government.

(2) This holding by the Fifth Circuit undertakes to decide an important federal question which has not been precisely settled by this Court, but which should be. Although this Court in *Standard Oil v. Johnson*, 316 U. S. 481, 62 S. Ct. 1168, held the Post Exchange to be "an integral part" of the War Department, so as to be immune from State taxation, at least under certain circumstances (page 485 of 316 U. S.), the question of the status of the employees was in nowise involved in that case. Our belief that the *Standard Oil* case does not answer the question resolved by the Fifth Circuit in the instant case is substantially reinforced, we believe, by two opinions of Mr. Justice Reed, following his retirement from the United States Supreme Court: One was a Court of Claims opinion, *Pulaski Cab v. United States*, 157 Fed. Supp. 955, and the other was a decision of the United States Court of Appeals, District of Columbia, in *Aubrey v. United States*, 254 F. 2d 768. In the *Pulaski* case Mr. Justice Reed relied in his opinion heavily upon *Borden v. United States*, a Court of Claims decision in 116 Fed. Supp. 873, where the Court pointed out that Post Exchange contracts were solely the obligation of the Exchange and were not government contracts, discussing the *Standard Oil v. Johnson* opinion in the course of doing so. In the *Aubrey* case Mr. Justice Reed discussed *Standard Oil v. Johnson*, indicating that this case has raised "certain doubts concerning the status of civilian employees of nonappropriated fund activities under the jurisdiction of the Armed Forces" (page 770 of 254 F. 2d). It

might also be pointed out that this question should be resolved by our highest court because the government itself has been quite ambivalent in the position it has taken in litigation with respect to the governmental status of nonappropriated funds activities, and the status of their employees, asserting the governmental status in the following cases, for example: *U. S. v. Forfari*, 268 F. 2d 29; *U. S. v. Levine*, 129 F. 2d 745; *Standard Oil v. Johnson*, 316 U. S. 481; *Keane v. U. S.*, 272 Fed. 577; *Krichman v. U. S.*, 256 U. S. 363; *Faleni v. U. S.*, 125 Fed. Supp. 630. Then in the following cases the government denied, to some extent at least, the governmental status of the activity, and/or its employees: *Daniels v. Chanute A.F.B. Exchange*, 127 Fed. Supp. 920; *U. S. v. Holcombe*, 277 F. 2d 143 (and see first appeal, 259 F. 2d 505); *Pearl v. U. S.*, 230 F. 2d 243; *Pulaski v. U. S.*, 157 Fed. Supp. 955; *Borden v. U. S.*, 116 Fed. Supp. 873; *Aubrey v. U. S.*, 254 F. 2d 768; *Blewer v. U. S.*, 117 Fed. Supp. 509; *Edelstein v. South Post Officers' Club*, 118 Fed. Supp. 40.

(3) This Fifth Circuit holding is in conflict with that of the Fourth Circuit in 1921 in *Keane v. U. S.*, 272 Fed. 577, where that Circuit reversed a conviction for conspiracy to defraud the United States by the defendant, a salesman, and a soldier named Brown, who was a detailed employee of a Post Exchange; it being charged that the defendant and Brown conspired to increase prices and to pad invoices on accounts at the Post Exchange. The direct question which was resolved in favor of the defendant in that case was "whether or not the Post Exchange mentioned in the indictment is such an institution as that a fraud upon the United States can arise from or be involved in any transaction concerning it." (Page 579) The Fourth Circuit stated that the highly penal statute involved could not apply "to any lawful department, so that a fraud upon the United States can arise from or be involved

in any transaction concerning it, unless such lawful department is created by Congress or directly authorized by it, and in addition thereto it must be 'such a lawful department' as that Congress appropriates the public monies to maintain and operate it." (Page 587) The Court of Appeals relied upon a Ninth Circuit holding, *Canella v. U. S.*, 157 F. 2d 470, which in our view can not only be distinguished, but is not nearly so consistent with the Supreme Court holding in *U. S. v. Krichman*, 256 U. S. 363, as is the Fourth Circuit's holding in the *Keane* case.

B. With reference to the letters seized in Petitioner Wilson's quarters, and our contentions that the letters were not the proper subject of the search warrant, that they were not described with particularity in the search warrant, and that there was an inadequate showing of probable cause (especially in view of the absence of the affidavit in alleged support of probable cause to issue the warrant), and our further contention that the letters could not be legally seized under a search warrant because the information relating thereto had come to the government through an illegal interception of the Petitioner Wilson's mail:

(1) The Fifth Circuit held in the instant case that the burden was on Petitioners to establish that the seizure under search warrant of the letters from Petitioner Wilson's quarters was the product of information gained from the illegal interception of these letters. (App. I, 20-21) The Fifth Circuit's opinion discusses evidence offered by the government in support of its contention that the search and seizure was the result of an origin "wholly independent of the unlawful interception;" however, it is quite evident that none of the information allegedly proceeding from the "wholly independent" lead suggested that there was any incriminating corre-

spondence between the Petitioner Harlow and the Petitioner Wilson, much less describing the same. The Fifth Circuit's holding in this particular, we believe, is in conflict with the holding of the Second Circuit in *U. S. v. Coplon*, 185 F. 2d 629, cer. den. 342 U. S. 920, which held that, although the defendant in the Trial Court had the burden of proving that there had been illegal wire tapping, once this had been established, the government then had the burden of proving that its evidence did not illegally proceed therefrom. Moreover, the Fifth Circuit's holding in this regard in the instant case is in conflict also with the Second Circuit in its recent decision (February 9, 1962) in *United States v. Paroutian*, 299 F. 2d 486, which held that the government had the burden of showing as a matter of fact, not as a "possibility," that independent information, and not previous unlawful searches, led to the discovery of incriminating evidence on a later occasion when they were conducting a search with the consent of the apartment house owner.

(2) The Fifth Circuit, *sub silentio*, held that it was not necessary for the warrant to describe the letters which were seized, and this holding is in conflict with that of the Second Circuit in *In Re No. 191 Front Street, Borough of Manhattan, City of New York*, 5 F. 2d 282. The search warrant in that case directed the officers to seize certain intoxicating liquors and records. The Trial Court in this case held against the defendant's contentions that the records should be returned for the reason, inter alia, that the affidavit in support of the warrant did not name the records desired. The Second Circuit reversed, and quotes the very general language of the affidavit referring to "any papers, books, records or documents pertaining to the sale, possession, or transportation of intoxicating liquors" and concludes that "This allegation does not warrant the seizure of papers nor could any testimony before

the Commissioner supply what is here missing." (Page 285 of 5 F. 2d)

(3) The Fifth Circuit's holding, *sub silentio*, that these letters, which we contend were "evidentiary" only in their character, could be the proper subject of seizure under a search warrant, is in conflict with the decision of the United States Supreme Court in *Gouled v. U. S.*, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647. In reversing on the basis of evidence illegally obtained, part of which were secured under a search warrant, the Court pointed out that not all property by any means could be the subject of a search warrant, and that such searches could be "resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful, and provides that it may be taken." (Page 309 of 255 U. S.)

C. With reference to the question presented by Petitioners' contention that they were prejudicially denied adequate advice as to the charges against them in the conspiracy count (One), coupled with the inadequate information in the government's Bill of Particulars and the misleading character thereof, and the Trial Court's failure to enforce his orders to the government to produce certain documents before trial for Petitioners' inspection and copying, and the Trial Court's denial of Petitioners' motion to inspect the Grand Jury minutes: the Fifth Circuit's holding in the instant case that the conspiracy count, together with the Bill of Particulars, adequately informed the Petitioners of the charges against them so that they were not seriously prejudiced is in conflict with the holding of the Sixth Circuit in *Reimer-Gross Company*,

et al. v. U. S., 20 F. 2d 36. One needs only to read the first four pages of the indictment, which purports to charge a conspiracy, to realize that the Petitioners had an extremely difficult, if not impossible, task to prepare an adequate defense to these vague and general accusations. On pages 3 and 4 of the indictment, for example, in paragraphs 6 through 10, and paragraph 12, the government was alleging in various ways that the Petitioners conspired to cause persons and firms, and corporations, and vendors, and agents of vendors, to enter into agreements to give Petitioners a part of their sales commissions, and to pay money into numbered bank accounts in Switzerland, and that Petitioners caused persons, firms, corporations, agents, etc., to believe there was a corrupt group of employees, known as "the organization" that had it in their power to award contracts, etc., and so on and on—with these persons, firms, etc., not being specified, not being named, not being defined. (R. 2-5) In its Bill of Particulars (R. 39), the government did not undertake to be more specific in identifying these persons and firms although we repeated our complaint through the office of our Motion for Bill of Particulars (R. 13-14), which was also overruled (R. 44-45).

We were faced, therefore, with the problem that the government might produce at the trial some of these unspecified persons and firms.

By reason of the vague and indefinite character of the allegations, the Petitioners had no real basis (even aside from the time and space problems involved) for investigation of these accusations, which substantially were alleged offenses occurring on the continent of Europe (with most of the activity apparently taking place some eight or nine years prior to the date of trial), so that the credibility of the testimony in these unspecified respects could be explored, and so that

Petitioners could accumulate information about the various contracts allegedly involved, which contracts were not specified. And, because the goods, wares and merchandise allegedly involved were not sufficiently identified so that Petitioners could have an opportunity of showing that it was highly unlikely that these unidentified persons and firms could believe that the Petitioners were in a position to influence awarding of these contracts in the capacities in which the Petitioners were then engaged, which capacities were not alleged.

That this particular aspect of the problem was not a fictitious one, was very well illustrated by the fact that the government did introduce evidence about persons and firms not alleged in the indictment. Over our objections, the government had the witnesses Stewart and Bray testify about arrangements that they made with the Appellant Addy to solicit bribes from persons who were not named in the indictment or Bill of Particulars, with respect to goods and merchandise not specified in the indictment or the Bill of Particulars. (R. 320-340)

Additionally, although the indictment vaguely alleged Petitioners conspired with "other persons to the Grand Jury unknown," government witnesses testified about a number of "conspirators."

McLane, for example, identified as members of the "organization": Mr. Friedman (R. 160, 292), Mr. Sockolow (R. 287-288), Col. Fredericks (R. 287-288), Mr. Richard (R. 282, 287), Col. Kendall (R. 282-283), Mr. Ross (R. 283), Mr. Swartz (R. 283-288) and Messrs. Bretts, Bosier, Wilkie, and Withwarsh (R. 287).

Stewart and Bray's testimony certainly could support the conclusion that they were conspirators with Appellant Addy in the "Black Forest" transactions. And Stewart also indi-

cated Friedman was a conspirator with Addy on the "Black Forest" transaction involving purported plans to remove a barber shop unit supplier from the EES black list (R. 325).

Reimer-Gross Co., et al. v. United States, 20 F. 2d 36 (Sixth Circuit, 1927) was a case where a conviction for concealing property of a bankrupt from the trustee was reversed on the insufficiency of the evidence, yet with the court definitely stating its opinion that the indictment was insufficient by reason of being too vague and indefinite. The allegation under attack in that case was that the defendant concealed "certain goods, wares, merchandise, money credits, and other things of value in the amount of $10,000.00 or more, a further and more particular description thereof being to the grand jurors unknown." The Court of Appeals stated that "every term used—i.e., goods, wares, merchandise, money credits, and other things of value—is general. The first three would include everything kept in a store or subject to any kind of mercantile trade. 'Money credits' is even more indefinite and general, and 'other things of value' is so indescribably broad as to be practically all-embracing. None of them signifies anything specific, or susceptible of the limited class identification." (Page 37) The Court goes on to say, on page 38, that an indictment may be indefinite either in the "character of the acts charged" or "the identifying circumstances."

We think it is evident that the indictment in the instant case is even more indefinite, and it is interesting to note that substantially the same language as condemned in the *Reimer-Gross* case is used in several paragraphs of Count One of the instant indictment. We believe the conflict of the Fifth Circuit's holding in the instant case with that of the Sixth Circuit in the *Reimer-Gross* case is emphasized by the Fifth Circuit's sustaining of the Trial Court's denial of our Motions

for Bill of Particulars and to inspect the Grand Jury minutes, and by the Trial Court's failure to enforce his order for pre-trial production of documents.

The Trial Court, in a letter order granting one of our motions to produce documents prior to trial observed: ". . . in view of the nature of this prosecution and the peculiar problems created by the varied geographic locations of the witnesses herein, it seems essential that the defendant Harlow be permitted to see, and copy if so desired, the documents taken from these other two alleged participants in order to avoid the element of unfair surprise at the time of trial." (R. 58) (Emphasis supplied)

We believe that an examination of our motion for Bill of Particulars (R. 1314-18) will show that we were not asking for the government's evidence, but for no more than reasonable "identifying circumstances" (*Reimer-Gross Co., et al., v. U. S.*, 20 F. 2d 36 [6 Cir., 1927]).

While the government's Bill at first reading might appear to supply impressive documentation, and truly "adequate compliance," furnishing us with "all critical information" (Trial Court's order denying motion—R. 44-45), a closer analysis will reveal that the government, while furnishing in its Bill certain details of evidence, withheld from us really vital "identifying circumstances."

Probably the most significant information withheld from us by the government were: 1. The names of the "other persons to the Grand Jury unknown" with whom Petitioners allegedly conspired, 2. Names of the "other persons, firms, and corporations . . . [and] organizations . . ." [i.e., other than McLane and Emborg and their firms] whom Petitioners allegedly were soliciting for bribes, and split commissions,

upon representations that they would be thereby awarded contracts with EES, 3. Names of the "corrupt group of employees within EES known as and commonly referred to as the 'organization,'" and 4. Names of the "vendors, or agents of vendors, who were supplying foodstuffs and other merchandise to the said EES" who were allegedly caused by Petitioners "to pay money into numbered bank accounts for the benefit of defendants," and 5. The bank accounts involved—all of which was specifically requested by us. (R. 1314-16)

With respect to each category the government not only withheld information known to them, but introduced over our objections damaging evidence respecting each category.

Indeed with respect to two categories—the vendors, or agents of vendors, allegedly caused by Petitioners to pay money into numbered bank accounts—and the bank accounts involved—the government did more than withhold; the government affirmatively misled Petitioners. In apparent response to paragraph 10 of our Motion for Bill of Particulars (R. 1315), the government in paragraphs one and two of its Bill of Particulars named only McLane and Emborg, and named only account number 751 in the Bank fur Anlagewerte, (R. 39-40) identified by Emborg as an account to which he was directed by Harlow to make payments. (R. 1033) Yet, during the course of the trial the government introduced evidence tending to indicate that vendors other than McLane and Emborg, or firms represented by them, paid money into accounts numbered 937 and 938 (for government witnesses Bray and Stewart respectively, in connection with an alleged agreement with Addy to solicit bribes from vendors—R.336 and see R. 320-322) and 939 (R. 338) for Addy, all in Bank fur Anlage-

werte (R. 339) as developed in testimony of the government witness Stewart.*.

It is difficult to see how the government in this act of misleading through the office of the Bill of Particulars is in any better light than was the State of Texas in *Alcorta v. State of Texas*, 355 U. S. 28, 78 S. Ct. 103 (1957), where a murder conviction was set aside where the prosecutor knowingly allowed false impressions of its key witness to stand uncorrected.

D. The Fifth Circuit's holding that any variance between the proof, showing two conspiracies, and the indictment, which charged only one conspiracy, could not affect Petitioners' substantial rights (App. I, 11) is in conflict with the United States Supreme Court decision of *Kotteakos v. United States*, 328 U. S. 750, 66 S. Ct. 1239. There were three signicant variances: First, in that the government proof tended to establish more than one separate and distinct conspiracy, as against, presumably, an allegation of one general conspiracy (Note: our contention that the conspiracy count was duplicitous—R. 1311—was overruled—R. 44). Second, that the indictment alleged a conspiracy among Petitioners and "other persons to the Grand Jury unknown" (R. 3), whereas the proof showed that the Grand Jury in all probability knew about the "other persons" (Stewart and Bray) about whom there was testimony reflecting a conspiracy with Appellant Addy. Third, that the indictment alleged that the Petitioner-conspirators solicited bribes from, and otherwise dealt corruptly with unspecified other persons, firms, corporations,

*His appearance before the Grand Jury seems established by the government's implied admission of this fact in its answer to our Motion to Inspect the Grand Jury Minutes (R. 70-75)—paragraph 8 of government's Answer (R. 89). Accordingly it would seem evident the government knew of this information.

organizations, vendors, and agents of vendors, besides McLane and Emborg, and the firms represented by them, whereas the government proof tended to establish solicitation of bribes and other corrupt dealings with specified persons and firms other than McLane and Emborg and their firms.

The indictment in Count One—the conspiracy count—undertook to allege a conspiracy between the Petitioners, one Paul Port (deceased at the time of trial) and "other persons to the Grand Jury unknown" to defraud the government by soliciting and receiving bribes from Robert T. McLane, Henrik Emborg "and other persons" engaged in the selling of merchandise to the European Exchange Service and by arranging to split the sales commissions of such persons with the Petitioners, and by related activities. (R. 2-5)

In our Motion for a Bill of Particulars, we asked that these "other persons to the Grand Jury unknown" and these "other persons" be identified (R. 1314-15) but the government did not identify them in the Bill of Particulars which it filed (R. 39), and the Court denied our Motion (R. 44-45).

During the course of the trial the government introduced evidence tending to establish a conspiracy between Harlow and Wilson to solicit and receive bribes from McLane and from Emborg.

There was no evidence whatsoever connecting Addy with this conspiracy, aside from McLane's testimony that Harlow and Wilson had made statements to him (McLane) reflecting that Addy was being paid by the "organization" (R. 163, 202).

The government witness Stewart testified that in July, 1952, and thereafter, he and government witness Bray, as EES investigators, agreed with Addy respecting the solicitation of funds from vendors of clocks in the Black Forest, and

also for Stewart and Bray to contact a German named Preetz for the purpose of making the arrangements for solicitation of bribes from some barber shop vendors, including a man named Eiler. The name of the barber shop firm was Hertzog; they had been blacklisted, and were to pay money to be taken off the blacklist. Additionally involved supposedly was a man named Friedman, in charge of purchasing barber shop units, and other vendors, for example, one called Rath-Geschwinn (R. 320-340).

There was no evidence of any character showing any connection whatsoever of Harlow, Wilson, Port, or McLane or Emborg, with any of these "Black Forest" transactions. Nor were Stewart or Bray, nor any of the vendors in the "Black Forest" transactions shown to be connected with the Harlow-Wilson "conspiracy."

We objected, bringing out that we had been denied the information asked for in our Bill of Particulars respecting the "other persons" and further that the firms mentioned by the government in their Bill of Particulars did not include the firms covered in this line of testimony. (R. 327, 322)

In our motions for acquittal, we raised the point of variance.* Under the government's evidence we had at least two separate and distinct conspiracies suggested. It might fairly be argued that there were several conspiracies embodied in the general Harlow-Wilson area, and several conspiracies involved in the Addy-Stewart-Bray area. Be that as it may, there were certainly two separate distinct general conspiracies involved in the government's proof.

Kotteakos v. United States (June 10, 1946), 328 U. S. 750, 66 S. Ct. 1239, is the leading case involving this point of the

*Harlow motion at end of government case on page 1150, 1152, 1054, 1157; Addy, 1157-1158; Wilson 1158-1159; and at close of whole case Harlow-1241, and Addy and Wilson-1158-1159.

fatal variance in proof where there is proof of multiple conspiracies and allegation of a single conspiracy.

In the *Kotteakos* case, the evidence showed that there was one defendant who was common to all of the conspiracies indicated by the proof, whereas in our case, there is no single individual who is connected up with both the Harlow-Wilson conspiracy and the Black Forest conspiracy.

The United States Supreme Court reversed the conviction holding that the error was not harmless, and specifically pointing out "the dangers for transferance of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place." (Page 774 of 328 U. S.)

In addition, the holding of the Fifth Circuit here that the variance was nonprejudicial (keeping in mind that the Fifth Circuit specifically found that "the indictment and bill of particulars failed to disclose even the haziest outlines of a conspiracy between Addy, Stewart and Bray to solicit and receive bribes from vendors other than McLane and Emborg . . ." (App. I, 10-11)) is in conflict with the Ninth Circuit decision in *Daily v. U. S.*, 282 F. 2d 818, the Second Circuit decision in *U. S. v. Russano*, 257 F. 2d 712, and the Ninth Circuit opinion in *Canella v. U. S.*, 157 F. 2d 470.

E. In holding that the substantive counts of the indictment properly laid venue in the Western District of Texas under Section 3238 of Title 18, United States Code, the Fifth Circuit decided an important question of federal law which has not been, but which should be, decided by the United States Supreme Court. Section 3238 reads as follows:

> "The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of

> any particular State or district, shall be in the district where the offender is found, or into which he is first brought."

All of the substantive counts depended upon the application of Section 3238 for venue in the Western District of Texas. Petitioner Harlow moved to dismiss substantive counts Four through Nine (charging Petitioner Harlow with receiving bribes from McLane and Emborg) on the grounds of lack of jurisdiction because it appeared from the indictment that these offenses, if any, were not committed within the Western District of Texas, but within the jurisdiction of the United States Court for the High Commission of Germany (R. 1312), which motion was denied (R. 44-45). The Fifth Circuit stated that there was "scant precedent" in this situation, and felt that the issue was whether or not the German occupied territory under the jurisdiction of the High Commission Court was a "district" within the meaning of Section 3238, the Fifth Circuit concluding that it was not. The Fifth Circuit went on to say that the High Commission Court did not have jurisdiction to try Petitioners for violating Section 202 of Title 18, United States Code. (App. I, 13) Yet the Fifth Circuit found double jeopardy in Petitioner Wilson's prior conviction of the conspiracy count, which substantially alleged a scheme to violate Section 202 of Title 18, United States Code, by the same High Commission Court (App. I, 21-25). We believe that the Fifth Circuit did not give sufficient consideration to the decision which supports the proposition that the Petitioner Harlow could have been tried by the High Commission Court, even if he had been in the United States at the time of the filing of the charges, because he could still have been arrested and returned to Germany by that Court. *In re Krausman*, 130 Fed. Supp. 926. See also *U. S. ex rel Mobley v. Handy*, 176 F. 2d 491. Moreover, we believe that the Fifth Circuit did not give proper consideration to the case of *U. S. v.*

Chapman, 14 F. 2d 312, where the United States District Court for the Western District of Washington held that the United States Court for China at Shanghai had jurisdiction to try offenses against the United States, and that the absence of the use of the word "district" in the title of that Court did not divest it of the character of a district court for the purposes of the removal statute. See also *28 Op. Attorney General 24 (Wickersham)*.

F. With reference to the question as to whether or not the Court of Appeals erred in holding as not prejudicial, on the basis that other evidence overwhelmingly established the guilt of the Petitioners, the erroneous admission of hearsay evidence: in the context of the trial in the district court, we believe that the erroneous admission of these several hearsay statements and documents constituted a departure from the accepted and usual course of judicial proceedings on the part of the district court, which departure was so far sanctioned by the Court of Appeals as to call for an exercise of the power of supervision of the United States Supreme Court. In its opinion below the Court of Appeals stated "Although a few items of evidence were possibly erroneously admitted over objections that they were hearsay, the guilt of Appellants Harlow and Wilson was established by overwhelming competent evidence. We are satisfied, therefore, that the rulings of which Appellants complain did not prejudice them." (App. I, 25) The rulings of which Petitioners complain on the basis of the Trial Court's admission of hearsay evidence included:

(1) Testimony by the prosecuting witness McLane, agent of a vendor dealing with the European Exchange Service, as to the contents of memoranda prepared by European financial institutions and purportedly reflecting transfers of money in

favor of an account number purportedly designated by the Petitioner Harlow. (R. 153-154, 231-239)

(2) A letter purportedly written by the prosecution witness McLane in London to the Petitioner Harlow in San Antonio, Texas. (R. 174-175, 179-182)

(3) A letter purportedly sent by the prosecuting witness Emborg, agent of a vendor to the European Exchange Service, to the American Express Company, requesting transfer of funds to a Swiss bank for two numbered accounts. (R. 1046-1048)

(4) A letter from the prosecuting witness Emborg to the Petitioner Harlow respecting a purchase order and the expected transfer of a large sum of money "in the usual way." (R. 1048-1056)

(5) "Confirmations" from financial institutions purportedly received by the prosecuting witness Emborg through the mail reflecting transfers to Swiss banks in favor of numbered accounts. (R. 1027-1045)

(6) A ledger sheet purportedly prepared by the secretary of the prosecuting witness Emborg and purportedly itemizing bribes paid to accounts designated by the Petitioner Harlow. (R. 1065-1078)

We believe it fair to say that proof that the prosecuting witnesses McLane and Emborg were depositing money to numbered Swiss bank accounts designated by the Petitioner Harlow was extremely important, if not vital, to the government's case. Indeed, the Court of Appeals recognized this fact, when it justified the government's delay in bringing Petitioners to trial until June of 1960, when the government had sufficient information, in Petitioners' view, to try Petitioners as far back as 1953. The Court of Appeals stated that

during a considerable portion of this period the government "was making a bona fide and vigorous attempt to gather information about the Swiss bank accounts. These accounts played a primary role in the alleged conspiracy, and information concerning them was necessarily important to the government's case against the Appellants. Though the government's effort ultimately proved fruitless, due to the unwillingness of the Swiss authorities to divulge any information about bank accounts, this does not mean that the time spent trying to obtain this evidence constituted unnecessary and unreasonable delay." (App. I, 6)

Of course, clearly proof of deposit of money in these numbered accounts was essential to a conviction of Petitioner Harlow on substantive counts four through nine, which charged him with receiving funds from McLane and Emborg in numbered Swiss bank accounts. Further, it would seem evident that proof of deposit of money in these numbered accounts would be at least as important to a conviction of Petitioner Wilson under substantive counts two and three, charging him with the solicitation of bribes from McLane, as would be the case of the conspiracy to do the same.

Now, aside from this hearsay testimony, Petitioners suggest that there was no evidence whatsoever to show deposits in these numbered Swiss bank accounts except the testimony of the prosecuting witnesses McLane and Emborg. Petitioners suggest that the jury may very well have disbelieved that part of the testimony of McLane and Emborg in the light of the considerable amount of discredit cast upon their testimony during trial, as well as the disclosure of ample motivation to falsify in this particular.

For example, the evidence developed that McLane had previously been convicted in Federal Court in Massachusetts for

selling smuggled goods and also convicted in a German court for smuggling (R. 266-267), and further the evidence shows that the European Exchange Service had held up some $400,000 due on contracts to firms represented by him and that McLane had asked for the government's aid in unblocking these accounts, and had also asked for the government's aid to get him out of jail in Holland. (R. 273-276) Furthermore, it appeared that McLane had a contract with a man named John Lamb for the sharing of commissions on contracts with the European Exchange Service, and that McLane had not in fact shared any of his commissions with Mr. Lamb. (R. 277-279) Further on in the cross-examination of McLane, it appears that McLane himself opened a numbered account in the Credit Swiss (the bank allegedly designated by Harlow as the depository for the "bribes"). This account was apparently in the name of the deceased defendant, Paul Port. McLane admitted his signature on two documents, one stating that Port had no interest in the account, his name being used only as a convenience and as a personal favor to McLane, and the other dated about a year later stating that McLane had received all of the funds for his own use and benefit. (R. 283-287, Ex. E-F)

We think that our impeachment of McLane might have been even more emphatic if the Trial Court had not ruled that none of the documents and exchanges of correspondence between McLane and the European Exchange Service with respect to the payments to his firms which had been "blocked" by the European Exchange Service were admissible. We asked that these documents be preserved and marked for appellate consideration, but find that they were not included among the exhibits sent up to the Court of Appeals, and that the Office of the United States District Clerk for the Western District of Texas, nor the Trial Court's law clerk, nor the

Court Reporter, have any knowledge of these instruments. (R. 273-274, 291-294, 843-844, and Affidavits beginning at page 1445 of the Record)

We were also impeded in our attempts to impeach McLane by the Trial Court's overruling of our request that McLane be required to produce during cross-examination the manuscript of a proposed book he said he had written about all his experiences with the European Exchange Service, including the transactions about which he testified. (R. 289-290, 294)

Similarly, the prosecuting witness Emborg was substantially discredited. He was a citizen of Denmark, under no legal compulsion to testify (R. 1080-1081), and was not required by the Court on cross-examination to state his reason for coming to San Antonio, Texas, to testify. (R. 1109) He admitted that during his interrogation by EES investigators all kinds of threats and promises had been made to him (R. 1081). He admitted that it was hinted that if he cooperated with the investigators, his companies could continue to do business with the European Exchange Service (R. 1082, 1105). Prior to trial he had advised Petitioner Harlow's counsel by letter reply that he had turned over to the government all documentation relating to the case, yet on cross-examination he admitted that there were records in his files in Denmark respecting large sums of money withheld by European Exchange Service from his firms. (R. 1088, 1109).

Furthermore, on cross-examination Emborg was evasive and negative in his recollection of his business associations with a man named Barry Finer. A government investigator named Coleman subsequently testified that Emborg told him that he was paying "kickbacks" into a numbered Swiss bank

account furnished by Finer, and that Finer had represented to Emborg that he could continue to receive contracts if he increased his offers and put the difference into this account (R. 1171).

We believe it, therefore, evident that aside from the intrinsic value of proof of deposit of funds into numbered Swiss bank accounts designated by the Petitioner Harlow, as already discussed, it was highly important to the government's case to corroborate these discredited and discreditable prosecuting witnesses. It would seem quite evident, without elaborating on their contents, that the hearsay statements and documents which the Trial Court admitted did very definitely have the tendency to corroborate these prosecuting witnesses.

Accordingly we do not believe that it could properly be said that "the judgment was not substantially swayed by the error[s]. . . ." *Kotteakos v. United States*, 328 U. S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557.

G. With reference to the question as to whether or not the Court of Appeals erred in holding that the government had not prejudiced the Petitioners' ability to prepare for trial by deliberate and unwarranted delay in bringing the case to trial: Petitioners suggest that this holding is in conflict with the holding of the United States Court of Appeals for the District of Columbia in *Williams v. U. S.*, 250 F. 2d 19, where a conviction of assault with a deadly weapon was reversed on the grounds that a seven-year delay in bringing the defendant to trial had caused him serious prejudice, and this even though this prejudicial delay was occasioned by the defendant's mental incompetence to stand trial. Furthermore, we believe that the Fifth Circuit's justification of the government's delay for the express purpose of the government's securing an advantage in the trial is in conflict with the

United States Supreme Court's per curiam affirmance in 76 S. Ct. 102 of *In re Petition of Provoo*, 17 F. R. D. 183 (U. S. D. C., Maryland, 1955).

Petitioner Harlow's verified motion, uncontested by the affidavit of government counsel in opposition to the motion to dismiss, reflected that charges similar to those contained in the instant indictment were filed against the Petitioner Harlow on or about the month of September, 1953, in the United States Court of Allied High Commission for Germany, and that since that time many of those connected with the European Exchange Service having valuable and relevant information had moved to other places of the world, and further that Paul Port, charged as a co-conspirator, and who supervised the drawing of all contracts between the Exchange System and vendors of food items, and who had full knowledge of the purchasing procedures of the European Exchange Service on the Continent of Europe, died on May 15, 1959 (R. 35-37). The indictment was not returned until April 19, 1957, and the case was not called for trial until June 6, 1960, having been set for trial by the Honorable W. R. Wallace, assigned from the Western District of Oklahoma, by a letter order dated March 23, 1960 (R. 44-45). The Court of Appeals in its opinion stated that up until about April, 1959 the government was making a vigorous effort to gather information about the Swiss bank accounts, and that shortly after the government learned that they would not secure this information, Appellants were arraigned. The Court of Appeals went on to say that from that time until the trial, a period of about one year, the Petitioners "made various discovery motions. This later delay, therefore, resulted from their own actions, and they can not now complain that it was unnecessary, and unreasonable." (App. I, 6) We believe an examination of the record will not support this very damaging hold-

ing on the part of the Court of Appeals. We believe that the first of Petitioners' motions, the same being to dismiss, to strike, and for bill of particulars, was filed on July 30, 1959 (R. 1304) and not ruled upon by the Court until March 23, 1960 (R. 44), the same day that the case was set for trial. It was thereafter that Petitioners made motions to produce documents under Rule 17(c) and motion to suppress evidence, and motion to inspect the Grand Jury minutes. We believe there is nothing in the record to show that the Court delayed the setting for the trial, or the trial, by reason of the filing of these motions. Additionally, it should be noted that Petitioner Harlow's motion to dismiss, filed on July 30, 1959, specifically assigned as a reason therefor the government's delay in bringing the case to trial. (R. 1313) It should also be noted that Judge Rives, concurring specially, in the opinion of the Fifth Circuit below in the instant case, considered that the proposition was not "well established," in the absence of a controlling decision of the Supreme Court, that the right to a speedy trial guaranteed by the Sixth Amendment does not arise until after a prosecution is instituted against the accused. (App. I, 25-26)

PRAYER

WHEREFORE, Petitioners respectfully pray this Honorable Court to issue its writ of certiorari to the United States Court of Appeals for the Fifth Circuit, commanding that the record of this cause be certified and delivered to the Supreme Court of the United States for review of the questions presented in this petition.

Respectfully submitted,

JOEL W. WESTBROOK, Esq.
306 Amicable Building
Waco, Texas

Attorney for Petitioner,
JAMES W. HARLOW

CHARLES E. WILSON, pro se
(Pending Admission to the Bar
of the Supreme Court of
James Gillespie, Esquire)

IN THE

Supreme Court of the United States

NO. _____

JAMES W. HARLOW and CHARLES E. WILSON,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

Appendix I to Petition for Certiorari

Opinion of the United States Court of Appeals for the Fifth Circuit

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18865

JAMES W. HARLOW, CHARLES E. WILSON and THOMAS F. ADDY,

Appellants,

versus

UNITED STATES OF AMERICA

Appellee.

Appeals from the United States District Court for the Western District of Texas.

(April 4, 1962)

Before TUTTLE, Chief Judge, RIVES and WISDOM, Circuit Judges.

TUTTLE, Chief Judge: The three appellants are former civilian employees of the European Exchange System (EES) which was established after World War II to operate various facilities, including the well-known military Post Exchanges, for the benefit of United States servicemen and other authorized personnel stationed in Europe. The appellants have been convicted of certain offenses relating gen-

erally to their alleged participation in a scheme involving the solicitation and receipt of bribes and kickbacks from certain vendors to the EES.

The indictment was returned against appellants on April 19, 1957. The first count charged them with the conspiring amongst themselves and with "other persons to the grand jury unknown "[1] to defraud the United States, in violation of 18 U.S.C.A. Section 371:[2]

> "One: Of and concerning its rights to have the business affairs, activities and functions, of the said European Exchange System, honestly and efficiently administered, exercised and performed, free from unlawful impairment, obstruction, or corruption, and collusion between employees of said agency and persons seeking to sell food products and other merchandise to said agency.
>
> "Two: Of and concerning its right to have contracts for the purchase of foodstuffs and other merchandise, which were entered into by EES, awarded in accordance with the established procedures and in an honest and businesslike manner, free from the solicitation and acceptance of money by the employees of said EES from persons, firms and

[1]The indictment also named one Paul Port as a co-conspirator, but Port died prior to the trial.

[2]"§371. Conspiracy to commit offense or to defraud United States.
If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both." 18 U.S.C.A. §371.

corporations, as bribes, kickbacks, commissions or otherwise.

"Three: Of and concerning its right to conscientious, faithful and honest services, decisions, actions and performances of the duties of its employees in said EES, free from corruption, partiality, improper influence and dishonesty, and from the solicitation or acceptance of money and things of value by its said employees from persons, corporations, and firms engaged in selling and endeavoring to sell foodstuffs and other merchandise, products and property to the said EES."

The second and third counts of the indictment charged the appellant Wilson with soliciting bribes on two occasions from Robert T. McLane, a representative of firms selling to the EES, in violation of 18 U.S.C.A. Section 202.[3] Counts four through nine charged the appellant Harlow with receiving bribes from Robert T. McLane and Henrik Emborg

[3] "§ 202. Accepting or solicitation by officer or other person.

Whoever, being an officer or employee of, or person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or agency thereof, or an officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or of both Houses thereof, asks, accepts, or receives any money, or any check, order, contract, promise, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, with intent to have his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both; and shall forfeit his office or place and be disqualified from holding any office of honor, trust, or profit under the United States." 18 U.S.C.A. §202.

(also a representative of suppliers to the EES), in violation of 18 U.S.C.A. Section 202.

The appellants were convicted as charged on June 16, 1960, in the United States District Court for the Western District of Texas, San Antonio Division. Judgments were entered and sentences imposed on February 14, 1961. This appeal followed.

Before discussing the numerous and varied contentions urged by the appellants, it would be well to describe briefly the scheme of corruption which the Government attempted to establish. In 1950, Harlow was Chief of the Food and Services Branch of the EES in Germany. In this capacity he possessed authority to negotiate for the purchase of various supplies and services by the EES from vendors throughout Europe. Appellant Wilson was Harlow's assistant; appellant Addy was the EES Chief of Security. Very simply, the Government sought to prove that the appellants and other civilian employees of the EES, known collectively as "the organization," induced certain vendors to pay them for the privilege of doing business with the EES. Those who paid were rewarded with contracts to supply the EES; those who did not received less favorable action on their bids. Bribe payments were allegedly channelled to the members of "the organization" through certain numbered bank accounts which "the organization" had established with various banks in Switzerland. This lucrative scheme is supposed to have continued from 1950 through 1953, at which time "the organization" was exposed and its illegal operations brought to a halt by the authorities.

The first contention pressed by the appellants is that the

trial court abused its discretion in refusing to dismiss the indictment on the ground that the Government "prejudiced appellants' ability to prepare for trial by deliberate and unwarranted delay in bringing the case to trial." The argument here is that the Government had sufficient information to try appellants as far back as 1953, and that the failure of the Government to bring them to trial until June, 1960, prejudiced their defense because various witnesses and records which might have aided their defense became unavailable during the seven year delay. We find no merit in this claim.

It is well established that the right to a speedy trial guaranteed by the Sixth Amendment and implemented by Rule 48(b) of the Federal Rules of Criminal Procedure[4] does not arise until after a prosecution is instituted against the accused. Any delay occurring between commission of the offense and commencement of prosecution is controlled exclusively by the applicable Statute of Limitations. *Hoopengarner v. United States*, 6 Cir., 270 F. 2d 465. In the instant case, criminal proceedings were formally initiated against the appellants when the indictment was returned against them on April 19, 1957. Since the indictment was returned within the allowable statutory period,[5] the only delay of

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[4]Rule 48 (b) provides:

"If there is unnecessary delay in presenting to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

[5]The conspiracy stated in count one of the indictment was alleged and proven to have continued through 1953, and various overt acts in furtherance of the conspiracy were alleged and proven to have been committed in 1953. The substantive offenses stated in counts two and three were alleged and proven to have been committed in 1953, and the offenses stated in counts four through nine were alleged and proven to have been committed

which appellants might complain is the delay between the date the indictment was returned [i.e. April 19, 1957] and the date they were brought to trial [i.e. June 6, 1960].

There are two reasons why appellants cannot succeed in their claim that they were denied a speedy trial. First, we do not think that the delay could be characterized as "unnecessary" or "unreasonable." Prior to April, 1957, and up to about April, 1959, the Government was making a bona fide and vigorous effort to gather information about the Swiss bank accounts. These accounts played a primary role in the alleged conspiracy, and information concerning them was necessarily important to the Government's case against the appellants. Though the Government's effort ultimately proved fruitless, due to the unwillingness of the Swiss authorities to divulge any information about the bank accounts, this does not mean that the time spent trying to obtain this evidence constituted unnecessary and unreasonable delay. See *Foley v. United States*, 8 Cir., 290 F. 2d 562. Appellants were arraigned soon after the Government learned that the information concerning the bank accounts would not be forthcoming. From that time until the trial, a period of about one year, the appellants made various discovery motions. This later delay, therefore, resulted from their own actions, and they cannot now complain that it was unnecessary and unreasonable. *United States v. Lustman*, 2 Cir., 258 F. 2d 475, cert. denied 358 U.S. 880.

Furthermore, even if the delay was unreasonable, appel-

between June and November, 1952. The period of limitations for all the offenses charged in the indictment is five years. 18 U.S.C.A. § 3282. The indictment returned on April 19, 1957, was, therefore, timely.

lants would be in no position to complain of it, since they never demanded an earlier trial. It is undisputed that the Government would have and could have gone to trial prior to June, 1960, if the appellants had so requested, despite the continuing unavailability of the information regarding the Swiss bank accounts. But appellants never complained of the delay until they made their motions to dismiss when the time for trial had arrived. The settled rule in the federal courts is that, under such circumstances, the appellants waived their right to challenge the legality of the Government's delay in bringing them to trial. United States v. Lustman, *supra*.

The appellants next contend that the conspiracy count should have been dismissed on the ground that it was too "vague and indefinite." This argument is likewise without merit. The indictment, in substance, charged the appellants with conspiring with "others" to defraud the United States of its right to have its European Post Exchanges honestly administered by agreeing to receive bribes from McLane, Emborg "and others" with respect to the sale of foodstuffs and "other merchandise" by these vendors to the EES. The gist of appellants' argument here is that the indictment should have specified the "other conspirators," and "other vendors" and the "other merchandise." We do not think such specificity was required. The indictment provided appellants with adequate information to prepare their defense. It outlined the general scope of the conspiracy and charged that it was part of the conspiracy that appellants would cause vendors or agents of vendors who were supplying merchandise to the EES to pay money into numbered bank accounts in Switzerland for the benefit of appellants. Numerous overt acts in furtherance of the conspiracy were

detailed. A bill of particulars voluntarily submitted by the Government set forth (1) that McLane and Emborg were the agents of vendors alleged to have been induced to pay bribe money; (2) the numbers of the numbered bank accounts; (3) the name and location of the banks; (4) the dates and amounts of money so paid; (5) the names and addresses of the vendors represented by Emborg and the type of foodstuffs sold by them; (6) the manner in which the appellants caused the bribe money to be deposited in the numbered accounts; and (7) the vendors represented by McLane. Moreover, since the Government did not attempt to prove transactions with vendors or agents of vendors other than McLane and Emborg or transactions relative to the sale of merchandise other than foodstuffs,[6] it is apparent that appellants were not seriously prejudiced by the indictment's reference to "other vendors" and "other merchandise." The failure of the Government to call any "other conspirators" or "other vendors" as witnesses against the appellants similarly negatived any chance of serious prejudice to appellants. In short, though the references to "other conspirators," "other vendors" and "other merchandise" may have rendered the indictment somewhat vague and uncertain, we are satisfied that this did not deprive the appellants of any substantial right.[7]

[6]There is one significant exception to this statement which will be discussed below in connection with the Government's attempt to establish appellant Addy's participation in the conspiracy.

[7]This discussion should also dispose of the contentions that the trial court erred in refusing to permit the appellants to examine the grand jury's minutes and in refusing to compel the Government to submit a second bill of particulars. The indictment itself and the bill of particulars voluntarily submitted by the Government provided appellants with adequate information to conduct their defense. We are also of the opinion that appellants were not seriously prejudiced by the Government's apparent failure to produce certain documents in accordance with the trial court's order that it produce all documents in its pos-

We now reach appellant Addy's contention that there was insufficient evidence to support the jury's verdict that he was a participant in the conspiracy charged in count 1 of the indictment. The Government apparently conceded that the indictment would be insufficient as to the appellant Addy if it merely charged him with conspiring with persons *other than* appellants Wilson and Harlow to solicit and receive bribes from vendors or agents of vendors *other than* McLane and Emborg. In other words, the Government admits that the substance of the charge against Addy is that he was a participant in a conspiracy involving Harlow and Wilson, whereby these appellants agreed to defraud the United States by receiving bribes from McLane and Emborg. Thus, if there is no competent evidence linking Addy with the activities of the other appellants, Addy's conviction must be overturned. We think there is no such competent evidence.

Some time in 1951, the highest authorities in the EES began to suspect that EES employees were soliciting and receiving bribes from vendors to the EES. In or about July, 1952, appellant Addy was first suspected of complicity in the bribery scheme. In order to expose this scheme, it was decided that two EES agents, namely, Bray and Stewart, would attempt to work their way into "the organization" through Addy. Bray and Stewart thus approached Addy and attempted to interest him in the possibility of taking bribes from vendors to the EES. Bray and Stewart testified

session which it had received from McLane and Emborg. The Government substantially complied with this order. The documents which were not produced were not of such significance as to make their non-production, and the consequent inability of defense counsel to examine them before trial, a ground for reversing appellants' convictions.

that Addy went along with their suggestions and that arrangements were made and carried out whereby Bray, Stewart and Addy engaged in the solicitation and receipt of bribes from various vendors. None of these transactions, however, involved Wilson and Harlow, on the one hand, or McLane and Emborg on the other; and, although the testimony of Bray and Stewart indicates that Addy was aware of "the organization" and its activities, there is no competent testimony showing that Addy was in fact a member of "the organization." The only evidence on this point is the testimony of McLane to the effect that Harlow and Wilson told him on various occasions that Addy was a member of "the organization." But this was obviously hearsay as to Addy, and it was incompetent to link Addy with the main conspiracy charged in count one of the indictment. *Montford v. United States*, 5 Cir., 200 F. 2d 759. At most, the Government established the existence of two separate conspiracies, one involving Harlow and Wilson and possibly others; and the other involving Addy, Stewart and Bray.* Since the Government attempted to establish Addy's guilt on the basis of his assumed participation in a conspiracy with Harlow and Wilson it would be manifestly unjust to permit Addy's conviction to stand on the ground that it was proved that he had conspired with Bray and Stewart. Especially is this true when considered in light of the fact that the indictment and bill of particulars failed to disclose even the haziest outlines of a conspiracy between Addy, Stewart and Bray to solicit and receive bribes from vendors

*Because of the view which we take of the case, it is unnecessary to consider whether appellant Addy could successfully contend that he was "entrapped" into the conspiracy with Bray and Ste t.

other than McLane and Emborg. We conclude, therefore, that appellant Addy's conviction should be reversed for lack of evidence.

Assuming the existence of two separate conspiracies, appellants Harlow and Wilson claim that this requires us to hold that there was a fatal variance between the proof, which showed two conspiracies, and the indictment, which charged only one conspiracy. But this Court has already held that:

> "If more than one conspiracy was proved, of at least one of which the appellant was guilty, it is clear that there was no variance affecting his substantial rights." Jolley v. United States, 232 F. 2d 84, 88, 5 Cir.

The evidence of Harlow's and Wilson's participation in the main conspiracy is overwhelming. Thus, the variance, if any, could not "affect [their] substantial rights."

Appellants Harlow and Wilson contend that the substantive counts of the indictment (i.e. counts two through nine) charging them with violations of 18 U.S.C.A. Section 202 should have been dismissed (1) on the ground that venue was improperly laid in the District Court for the Western District of Texas; (2) on the ground that, as civilian employees of the EES, they do not come within the purview of 18 U.S.C.A. Section 202; and (3) on the ground that there was insufficient evidence to justify submission of the question of their guilt to a jury. We think all these contentions must fail.

(1) The Government sought to lay venue in this case in the Western District of Texas under 18 U.S.C.A. Section 3238. That section reads as follows:

> "§3238. Offenses not committed in any district.
>
> The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought."

Each of the substantive counts alleged that the offenses were committed out of the jurisdiction of any particular state or district and that the appellants, since the commission of the offenses, had returned to the United States and, on the date of the return of the indictment, were found in the Western District of Texas.[9] Appellants contend, however, that the offenses were not committed out of the jurisdiction of "any particular state or district"; they claim that the territory occupied by the United States in Germany and governed by the United States High Commissioner for Germany was a "district" within the meaning of Section 3238, that the former United States Court of the Allied High Commission of Germany had jurisdiction over this "district," and that the offenses were committed within this

[9]Appellant Harlow contends that the allegations of counts five through nine were not sufficient to establish venue in the Western District of Texas under Section 3238 because there was no specific allegation that the offenses charged therein were committed "out of the jurisdiction of any particular state or district." These counts, however, did expressly allege that the bribe money, at Harlow's request, was deposited in a certain numbered bank account in Switzerland. We think this was sufficient to establish that the offenses involving the "receipt" of bribe money were committed in Switzerland, which is, of course, "out of the jurisdiction of any particular state or district."

"district." They conclude from this that the High Commission Court had exclusive jurisdiction to try them for the offenses charged in the indictment.

We cannot agree. Since Section 3238 has been the subject of infrequent litigation, there is scant precedent to guide us in resolving the issue raised by appellants' argument. That issue, simply stated, is whether the German occupied territory under the jurisdiction of the High Commission Court was a "district" within the meaning of Section 3238. We think that it was not. In our view, territory governed by the United States is not a "district" under Section 3238 unless the court having jurisdiction over that territory is invested with the same power as ordinary district courts to try offenses made such by laws of Congress. We cannot believe that Congress meant to preclude the district courts from exercising jurisdiction over an offense against the laws of the United States simply because the acts constituting the offense were committed within the territorial jurisdiction of a military or quasi-military tribunal deriving its authority from the United States Government, but having no power to punish those acts as an offense against the laws of the United States. *United States v. Newth*, 149 Fed. 302. The High Commission Court did not have jurisdiction to try appellants for violating Section 202 of 18 U.S.C.A., though it had the power to punish them if their acts transgressed the laws of the Allied High Commission or the laws of the occupied territory.[10] Under these circumstances, we

[10]The High Commission Court has jurisdiction over:
"(i) All offenses against the laws and usages of war.
(ii) All offenses under any proclamation, law, ordinance, notice or order issued by or under the authority of the Military Government or of the Allied Forces.

think that the "offenses" charged in the present indictment were committed outside the jurisdiction of "any particular state or district" and that venue was therefore properly laid in the District Court for the Western District of Texas under 18 U.S.C.A. Section 3238.

(2) 18 U.S.C.A. Section 202, in substance, makes it a crime for any "employee of, or person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or agency thereof" to solicit or receive bribes. Appellants Harlow and Wilson claim that a civilian employee of EES is neither an "employee of" the United States nor a "person acting for or on behalf of the United States," so as to come within the prohibitions of Section 202. We think otherwise.

Appellants' argument in this regard is bottomed on two facts; first, that their employment contracts with the EES specifically stated that an EES employee is "not considered to be a Federal employee," and second, that EES is a non-appropriated funds activity, the employees of which, under 5 U.S.C.A. Section 150(k), are not "considered as employees of the United States for the purpose of any laws administered by the Civil Service Commission or the provisions of the Federal Employees Compensation Act."

Though there is doubt that the appellants, as EES employees, could be considered federal employees within the meaning of Section 202, we are nevertheless convinced that

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(iii) All offenses under the laws of the occupied territory, or of any part thereof."
United States Military Government Ordinance No. 2, Military Government Courts, 12 Fed. Reg. 2190-2191.

they were at least "persons acting for or on behalf of the United States" within the purview of that statute. In *Standard Oil Company v. Johnson*, 316 U.S. 481, post exchanges were held immune from state taxation on the ground that they "are arms of the Government deemed by it essential for the performance of governmental functions"; the Court further stated that post exchanges are "integral parts of the War Department." It is significant that appellants' employment contracts, though negativing their position as federal employees, expressely stated that the EES "is an instrumentality of the United States Government and an organization of the Department of the Army." It is likewise significant that 5 U.S.C.A. Section 150(k) expressly provided that that statute would not affect "the status of these non-appropriated fund activities as Federal instrumentalities." We have no doubt, therefore, that the EES is an instrumentality of the United States Government and that appellants, as employees of this instrumentality, were acting "for or on behalf of" the United States so as to bring them within the prohibitions of 18 U.S.C.A. Section 202. See *Canella v. United States*, 9 Cir., 157 F. 2d 470, and the annotations in 18 U.S.C.A. Section 202.

(3) Counts two and three of the indictment charged that appellant Wilson on August 11, 1953, and August 12, 1953, telephoned McLane in Brussels, Belgium and asked him to deposit bribe money to the account of the Gulf States Trading Company, which had been established by the appellants Harlow and Wilson. The Government conclusively established that Wilson telephoned McLane in Brussels on July 31, 1953, and discussed the deposit of bribe money to the account of the Gulf States Trading Company. It was also proven that McLane telephoned Wilson on August 6th, 11th

and 15th, 1953, and spoke to him about this deposit. We think this proof sufficiently established Wilson's guilt under counts two and three. Who made the telephone calls and on what specific dates were obviously factors of little materiality to the charges against Wilson.

Counts four through nine charged Harlow with receiving bribe money from McLane and Emborg. As to these counts, the Government's proof showed clearly that McLane and Emborg had deposited money in certain numbered bank accounts at Harlow's request. Harlow claims, however, that there was no evidence that he actually received any of this money. We think this contention to be frivolous. In our view the deposit of money into accounts designated by Harlow constituted constructive if not actual receipt of this money by Harlow. Proof of these deposits was therefore sufficient to establish Harlow's guilt under counts four through nine.

Appellants Harlow and Wilson next contend that the trial court erred in denying their motions to suppress evidence. This evidence consisted of certain incriminating letters which were written by Harlow after he had returned to San Antonio sometime in 1953 to Wilson in Germany. These letters had been seized from Wilson's quarters by EES agents under a warrant issued by Judge Turmo of the United States Court of the Allied High Commission. The warrant was issued on an affidavit prepared by one Canfield, who was at that time a prosecutor in the seventh Judicial District of the Courts of the Allied High Commission for Germany. Since Canfield's affidavit could not be located by the Government at the time of trial, the Government sought to prove its contents by the oral testimony of Canfield himself, by the testimony of Judge Turmo, who

issued the warrant, and by the testimony of Warrant Officer Coleman, who was in charge of the EES investigation of "the organization." Appellants objected to this testimony on the ground that the Government had not established a proper predicate, the contention being that oral testimony could not be received to establish the contents of the affidavit until the Government first proved that a diligent search had been made for the document by its last known custodian and that it had been lost through no fault of the Government. After this objection was made, the Government secured a certificate from a Legal Officer at the Embassy of the United States at Bad Godesburg, Germany,[11] stating that he had made a diligent search for the affidavit but that it could not be found.

Appellants contend, however, that there is no indication that defense counsel ever received the original certificate or that the trial court ever examined it to see whether it justified the receipt of the oral testimony.[12] Assuming this to be true, however, we think it is quite immaterial. Since the certificate obviously constituted an adequate predicate for the admission of the oral testimony relative to the contents of the affidavit,[13] we are unable to say that appellants were seriously prejudiced by the facts of which they now complain.

Appellants then argue that, even if the certificate was an adequate predicate for the admission of oral testimony,

[11]Apparently, the records and files of the former United States Court of the Allied High Commission for Germany are now kept in various United States embassies in the Federal Republic of Germany.
[12]How or why this occurred is not entirely clear from the record.
[13]See Rule 27 of the Federal Rules of Criminal Procedure and Rule 44 (b) of the Federal Rules of Civil Procedure.

this testimony was insufficient to establish the requisite probable cause for issuance of the search warrant. We disagree. Canfield testified that the basis for his application for the warrant was information furnished him by McLane and Emborg through oral conversation and in written statements: McLane and Emborg had exposed the whole bribery scheme, and had told the EES agents of their deposits of bribe money into the numbered bank accounts at the request of Harlow and Wilson. The testimony of Warrant Officer Coleman and Judge Turmo was to the same effect. Certainly, there was probable cause to issue the search warrant on the basis of the information given by McLane and Emborg that they had paid Wilson for getting them contracts to supply the EES.

At the trial it came out that the EES agents investigating the bribery scheme had been intercepting and photostating Wilson's mail prior to the time that the letters from Harlow to Wilson were seized by the agents under the search warrant. McLane testified that the agents told him of these interceptions when they were interrogating him. Appellants thereafter moved for a mistrial on the ground that the above testimony demonstrated that the Harlow-Wilson letters had been improperly admitted, in that the warrant for the seizure of these letters was procured on the basis of information gathered by the investigating agents as the result of the illegal mail interceptions. In other words, appellants claimed (a) that McLane was interrogated only after the investigating agents learned of his participation in the bribery scheme by examining the letters which had been illegally intercepted; (b) that McLane thereafter confessed and persuaded Emborg to confess; and (c) that the confessions of McLane and Emborg were the basis for the

issuance of the search warrant. From this appellants concluded that the evidence seized under the search warrant was the ultimate product of the illegal seizure of Wilson's mail.[14]

The trial court denied the motion for a mistrial on the ground that "the letters were obtained as a direct result of an origin wholly independent of the unlawful interception." This "wholly independent" lead to McLane was identified as a letter which had been sent to the FBI in the United States by a Dutch banker named Hoogervorst and which had come through Army channels to the investigating agents prior to the interceptions of Wilson's mail. The information supplied by Hoogervorst was to the effect that McLane was making large monthly transfers of money from banks in Holland to banks in Switzerland. After this letter was received, agent Coleman visited Hoogervorst in Amsterdam. Coleman testified that Hoogervorst could not understand how McLane "was making all these money transfers into Swiss banks" when he was employed by Dutch firms; that Hoogervorst said he could get documents to prove that McLane was shipping out some $4000 to $5000 a month to the Credit Swiss Bank in Basle, Switzerland; that he, Coleman, returned and told his superiors what he had learned and that he could get copies of these bank transfers from Hoogervorst. Coleman testified further that Hoogervorst produced the documents and that they were photostated by the investigating agents, and that this information which had been received from Hoogervorst was the initial stimulus to the investigation of McLane.

[14] We think it clear that appellant Harlow, as the author of the letters which were seized, had a sufficient interest in these letters to enable him to attack the alleged illegality of their seizure. Cf. Henzel v. United States, 5 Cir., 296 F. 2d 650.

We agree with the trial court's disposition of this issue. Knowing that McLane was a representative of a number of firms selling to the EES, and suspecting the existence of a bribery scheme whereby vendors or their agents would deposit bribe money in Swiss bank accounts, the information received from Hoogervorst naturally led the investigating agents to suspect that McLane was somehow involved in the scheme. The investigating agents were not forever precluded from interrogating McLane and pressing him to confess merely because they thereafter illegally seized other evidence tending to implicate McLane in the bribery scheme. McLane did not indicate that he would not have confessed if he had not been told of the interceptions of Wilson's mail by the investigating agents.[15] For all we know, McLane would have told all regardless of whether this information was imparted to him by the investigating agents. Knowing that he was suspected of paying bribes to Harlow and Wilson, and confronted with the documentary evidence of his money transfers to Swiss banks, McLane may well have been persuaded that the "jig was up" and that it would be best for him to make a full disclosure of his dealings with Harlow and Wilson. We are unable to say, therefore, that the information received from McLane, which led to the search of Wilson's quarters, was the ultimate product of the illegal interceptions of Wilson's mail. The burden was on the appellants to establish that a substantial part of the case against them was "a fruit of the poisonous tree." *Nardone v. United States*, 308 U.S. 338, 341. In our opinion, appellants failed to carry this burden. The

[15]It might be noted that agent Coleman, who interrogated McLane, denied ever informing him of these interceptions. However, the trial court apparently found to the contrary on the basis of McLane's testimony, and we cannot say that his finding was clearly erroneous.

trial court thus did not err in denying the motion for a mistrial. See *United States v. Bell*, D.C.D.C., 126 F. Supp. 612.

We come now to appellant Wilson's plea that his trial and conviction on the conspiracy charge violated the constitutional prohibition against double jeopardy. This plea is based on the fact that, in March, 1954, Wilson was convicted before the United States Court of the Allied High Commission for Germany for conspiring with Harlow and others to receive bribes from persons selling merchandise to the EES, in violation of the Laws of the Allied High Commission.[16] Wilson was sentenced to six months in prison but was released before the entire sentence was served after he promised to cooperate with the authorities in their further investigation of "the organization." The plea of double jeopardy based on the above conviction was rejected by the court below.

There are always two questions which must be resolved when a defendant in a criminal case interposes a plea of former jeopardy. The first is whether both tribunals before which the defendant was tried derived their authority and jurisdiction from the same sovereign;[17] the second is

[16]Wilson was also tried for "receiving" bribes, in violation of the Laws of the Allied High Commission and Paragraph 266 of the German Criminal Code relating to breach of trust. He was acquitted on these charges. Wilson apparently concedes that his acquittal on the charges of *receiving* bribes was not a bar to his prosecution for *conspiring* to receive bribes and for *soliciting* bribes. See United States v. Bayer, 331 U. S. 532, 542.

[17]United States v. Grafton, 206 U. S. 333, 352. Neither the Fifth nor the Fourteenth Amendments prohibit multiple prosecutions by different sovereigns, even though the prosecutions are based on the same facts and require the same evidence to sustain them. See Bartkus v. United States, 359 U. S. 121 and Abbate v. United States, 359 U. S. 187.

whether both prosecutions were for the same "offense." Thus, in the instant case, we must determine (1) whether the United States Court of the Allied High Commission for Germany derived its authority and jurisdiction from the United States and (2) whether the offense of conspiracy for which Wilson was convicted below was the same offense for which he was convicted in the High Commission Court.

As to the first question, there can be no doubt that the former United States Court of the Allied High Commission for Germany derived its authority and jurisdiction from the United States. *Madsen v. Kinsella*, 343 U.S. 341, made this absolutely clear. In that case the Supreme Court fully discussed the history and nature of the High Commission Court.

Nor can there be any doubt that an acquittal or conviction before a military or quasi-military tribunal deriving its authority and jurisdiction from the United States can be set up as a bar to another prosecution for the same offense before a civil court of the United States. This has been the law at least since the Supreme Court decided *Grafton v. United States*, 206 U.S. 333. In that case it was held that a soldier acquitted of the crime of homicide by a military court-martial of competent jurisdiction proceeding under the authority of the United States could not subsequently be tried for the same offense in a civil court deriving its authority from the United States. The Court spoke in these words:

> ". . . . The express prohibition of double jeopardy for the same offense means that wherever such prohibition is applicable, either by operation of the

Constitution or by action of Congress, no person shall be twice put in jeopardy of life or limb for the same offense. Consequently, a civil court proceeding under the authority of the United States cannot withhold from an officer or soldier of the Army the full benefit of that guaranty, after he has been once tried in a military court of competent jurisdiction. Congress, by express constitutional provision, has the power to prescribe rules for the government and regulation of the Army, but those rules must be interpreted in connection with the prohibition against a man's being put twice in jeopardy for the same offense. The former provision must not be so interpreted as to nullify the latter. If, therefore, a person be tried for an offense in a tribunal deriving its jurisdiction and authority from the United States and is acquitted or convicted, he cannot again be tried for the same offense in another tribunal deriving its jurisdiction and authority from the United States. A different interpretation finds no sanction in the Articles of War; for the 102d Article of War (which is the same as Article 87, adopted in 1806, 2 Stat. 369) declares that 'no person' — referring, we take it, to persons in the Army — 'shall be tried a second time for the same offense.' But we rest our decision of this question upon the broad ground that the same acts constituting a crime against the United States cannot, after the acquittal or conviction of the accused in a court of competent jurisdiction, be made the basis of a second trial of the accused for that crime in the same or in another court, civil or military, of the same government . . . . ."

We come then to the question of whether Wilson's conviction on count one of the instant indictment relates to the same offense for which he was convicted in the High Commission Court. As to this question, it is now settled that "the test of identity of offenses is whether the same evidence is required to sustain them." *Morgan v. Devine*, 237 U.S. 632, 641. That the offenses are not "the same in name" is immaterial. *Grafton v. United States*, *supra*, at 351. Thus, the ultimate issue here is whether the proof required to sustain Wilson's conviction on count one of the instant indictment was the same proof as was required to sustain his conviction for violating the Laws of the Allied High Commission. We think that it was.

The essence of both conspiracy charges was that Wilson had agreed that Harlow and others to receive bribes from persons selling merchandise to the EES. Both charges involved the same agreement, the same vendors, the same merchandise, the same numbered bank accounts, etc. In short, both charges related to one continuing conspiracy and to Wilson's participation in it. The evidence adduced at both trials demonstrating Wilson's participation in the conspiracy was substantially identical. Nothing of significance that was proven at the second trial had not already been proven at the first. This evidence was sufficient to sustain Wilson's conviction for violating the Laws of the Allied High Commission and for violating 18 U.S.C.A. Section 371. The offenses, though not "the same in name," were the same in fact. Since Wilson has already been convicted for conspiring with Harlow to take bribes from McLane and Emborg, his conviction on count one of the indictment for the same offense cannot be allowed to stand. It clearly vio-

lates Wilson's constitutional right to be free of successive prosecutions for the same offense.

Finally, the appellants have raised numerous issues with respect to the trial court's charge and with respect to the admission and exclusion of various items of evidence. We have carefully examined the trial court's instructions to the jury and find them adequate. Although a few items of evidence were possibly erroneously admitted over objections that they were hearsay, the guilt of appellants Harlow and Wilson was established by overwhelming competent evidence. We are satisfied, therefore, that the rulings of which appellants complain did not prejudice them.

For the reasons above stated, (1) the conviction of appellant Harlow on all counts is AFFIRMED; (2) the conviction of appellant Wilson on counts two and three is AFFIRMED; (3) the conviction of appellant Wilson on count one is REVERSED; and (4) the conviction of appellant Addy on count one is REVERSED.

RIVES, Circuit Judge, Concurring specially:

I concur in the result, but differ from one part of the opinion which seems to me not necessary for the result. The statement in the opinion that the right to a speedy trial guaranteed by the Sixth Amendment does not arise until after a prosecution is instituted against the accused is supported by several opinions of Courts of Appeals. See *Foley v. United States*, 8 Cir., 1961, 290 F. 2d 562, 565, and cases there cited. It does not seem to me, however, that that

proposition is "well established" in the absence of a controlling decision of the Supreme Court; and, with deference, I am not convinced that it is sound. I forego expressing reasons for my doubts because I am satisfied that, under the facts of this case, there was no unnecessary and unreasonable delay at any stage, either before the prosecution was instituted or afterward. In all other respects, I am in full accord with the comprehensive and able opinion. I therefore concur specially.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

By GILBERT F. GANUCHIAN
Deputy

New Orleans, Louisiana, May 14, 1962.

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